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IN THE

SUPREME COURT

OF THE UNITED STATES

NO. 80-5751

TIMOTHY GEORGE BALDWIN

Versus

STATE OF LOUISIANA

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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NO. 80-5761

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner, Timothy Baldwin, has applied to this Honorable Court for a writ of certiorari setting forth four issues for review. It is respectfully submitted that this application should be denied for the reasons set forth as follows.

ASSIGNMENT NO. 1

In an exhaustive argument appellant contends that the death penalty per se constitutes impermissibly, cruel and unusual punishment in violation of the United States and Louisiana Constitutions because "the death penalty does not deter murders, and accordingly makes no measurable contribution to acceptable goals of punishment."

This Honorable Court declared in Gregg vs. Georgia, 428 U.S. 153 (1976) the validity of the death penalty:

> Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.,
>
> ...(W)e are concerned here only with the imposition of capital

> punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme crimes.
>
> We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.

It is respectfully urged that this court should follow this decision rejecting the argument that the death penalty is unconstitutional per se.

Petitioner now relies on extensive evidence that was never presented in the State District Court in support of the argument that retribution is no longer a valid basis for capital punishment as it does not comport with the dignity of man and does not serve as a deterent to murder. The State has had no opportunity to cross-examine the experts relied upon in support of the arguments presented herein. The disadvantage is reflected by a notation of some of the statements that are made herein that are obviously subject to attack.

The statement that the death penalty is not a deterrent is based in part on the study of Stephen J. Knorr who petitioner admits found it may be humanly impossible to prove one way or the other the deterrency question by statistical studies. We also see the argument that the only deterrency theory which has any basis in modern society is the probability of apprehension. The obvious thought is why is fear of apprehension a deterrent except for the consequences after apprehension. We further see reliance on Florida statistics that the murder rate increased in Florida in 1979 after the Spinkelink execution pointing out there were "857 murders in the State of Florida in 1977, 949 in 1978 and 1,084 in 1979." These statistics

fail to point out while there were 1,084 murders in 1979 there were 1,132 in 1975 or the significance, if any, of this.

The State will not attempt to analyze petitioner's evidence in support of its contention since as urged hereinabove this is not a matter to be properly considered by the reviewing court without having been presented as part of the trial court record in an adversary proceeding, and, it is urged if this court should conclude this evidence is pertinent it should at least be remanded for a hearing on this issue in the trial court. However, it is urged even with a consideration of the evidence as stated, there is no showing to warrant the conclusion that the death penalty is under all circumstances cruel and unusual punishment.

ASSIGNMENT NO. 2

In his second argument appellant contends under the Louisiana provisions for capital review defendant has been denied meaningful appellate review maintaining that there must be a statewide comparative review of death cases rather than the requirement of Rule 28 of the Louisiana Supreme Court that the review is limited only to first degree murder cases of the judicial district in which the offense being reviewed occurred. More particularly appellant points out that he was convicted in a district from which only two cases were compared and thereby has been denied the constitutional protection which accrue to defendants in larger districts. In conclusion his contention is that the appellate process itself must not be arbitrary and capricious.

The State of Louisiana respectfully submits that this assignment lacks merit as reflected by relevant case law on the subject.

The Supreme Court of the United States has upheld the death penalty in those situations where a state's death penalty statute is found to be neither arbitrary nor capricious. Gregg

v. Georgia, supra; Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. FLorida, 428 U.S. 242 (1976). Various safe-guards to insure a death sentence be neither arbitrary nor capricious have been recognized by the Supreme Court of the United States. Particularly in Gregg v. Georgia, supra, the court held as follows:

> The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guideline.

More pertinent to the issue herein the court in Gregg further observed that along with the safeguards legislated to guide the jury, "the review function of the Supreme Court of Georgia affords additional assurance...."

Similarly, the court held in Jurek v. Texas, supra, that the Texas death penalty statute did not violate the Eighth and Fourteenth Amendments finding that at the bifurcated hearing the jury would have adequate guidance to enable it to perform its sentencing function. The court herein further observed, "By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote evenhanded, rational and consistent imposition of death sentences under law."

It is finally concluded in Jurek, "Because this system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed it does not violate the constitution."

It is obvious from the decisions of the United States Supreme Court the intent is to assure that the death sentence

will not be "wantonly or freakishly" imposed. It is likewise clear this may be accomplished by differing modes.

It must be noted that the appellate review in Louisiana is like that of Texas insofar as it is a court with statewide jurisdiction. While the State is required to set forth in memorandum a list a each first degree murder cases in the district with a synopsis of the facts in the district, it should be noted Rule 28 further requires that every death sentence be reviewed by this Court under the following guideline:

> (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
> (b) whether the evidence supports the jury's finding of a statutory circumstance, and
> (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and defendant.

It is difficult to conclude under this rule and being a court of statewide jurisdiction that this appellate review is arbitrary and capricious. While the court's attention is directed more closely to first degree murder cases of the district of the case under review this does not limit the review and by the mere fact of statewide jurisdiction the court must necessarily be aware of death penalty cases as a whole. State v. Morgan, 147 La. 205, 84 So.589 (1920) cert. denied, 253 U.S. 498.

However, even insofar as the limited review to first degree murder cases of the particular judicial district, it is urged that petitioner's argument does not establish that the Louisiana Supreme Court's review process is ineffective. Any suggestion that the Louisiana Supreme Court engages in only cursory or rubber-stamp review of death penalty cases is totally controverted by a study of the death penalty cases considered by this court and recognition of its reversals. See, State v. English, 367 So.2d 815 (La. 1979); State v. Collins,

370 So.2d 533 (La. 1979); State v. Sonnier, 380 So. 2d 1, (1979); and State v. Sonnier, 379 So.2d 1336 (1980). Of the fourteen cases that have reached the Louisiana Supreme Court in which a death penalty had been imposed by the jury eight have been reversed, seven of which the conviction was affirmed and only the sentence set aside.[1]

It is further urged that while the Louisiana Supreme Court's attention is directed to only the first degree murder cases of the particular district in which the case under review occurred, we see that the court is not enlightened on only those cases in the district in which death was imposed but to the outcome of all first degree murder cases, and, it may be urged as was contended by appellant's counsel in Proffitt that this is a more balanced view of the way the first degree murder cases are treated. As the court answered in Proffitt we contend that looking at all first degree murder cases in a particular district as compared to reviewing just death penalty convictions in the state "is not sufficient to raise a serious risk that the state capital-sentencing system will result in arbitrary and capricious imposition of the death penalty." Proffitt v. Florida, supra, at 259.

A study of the Louisiana court's action in its review of capital cases clearly supports this conclusion.

Moreover, while the opinion of the Louisiana Supreme Court refers to only two other first degree murder convictions in the district, it is pertinent to note the sentence review memorandum of the state filed in the Louisiana Supreme Court

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1/ Of the six affirmed two have applied for and had writs denied by the United States Supreme Court and presented the same issue as presented herein. See, Prejean vs. Louisiana, 79-6826, and Martin vs. Louisiana, 79-6341.

set forth the facts and results of eight cases involving first degree murder charges for that judicial district. There is no reason to believe each was not considered.

In conclusion, it is submitted that the Louisiana legislature has met and exceeded the safeguards required by the Supreme Court of the United States to insure the death penalty will not be applied in an arbitrary and capricious fashion. The review followed by the Louisiana Supreme Court pursuant to Rule 28 is beyond attack and the decisions of the Louisiana Supreme Court clearly reflect that it has exercised its review to insure that a unjust penalty will not be handed down in the state in a wanton or freakish manner. We find no merit in the attack that the appellate review is inadequate to insure the protection of a defendant's right.

ASSIGNMENT NO. 3

In this application for rehearing petitioner reurges his contention that the trial judge abused his discretion in failing to grant defense counsel's challenge for cause of prospective juror Vera Glass. It is contended now, as was urged below, that this prospective juror thought an indictment was an indication of guilt; that she tended to believe law enforcement officers over others; and she felt failure of a defendant to testify inferred guilt. Petitioner maintains although the court attempted to rehabilitate Mrs. Glass, she was not rehabilitated and the refusal to excuse her for cause resulted in a violation of defendant's rights and his conviction should be reversed.

It is respectfully submitted that the Louisiana Supreme Court did not err in holding, "There was no abuse of discretion in the refusal to allow the challenge for cause." This conclusion is fully supported by a study of the transcript.

Mrs. Glass indicated that she felt law enforcement officers must have some evidence of guilt to obtain an indict-

ment but when questioned if instructed that a charge cannot be used as evidence of guilt and if she could try that individual strictly on the evidence she heard and not what some person might have thought in the past, she responded, "Yes, I'm sure I could."

Additionally, she declared that the fact her son had been a deputy and that she knew other law enforcement officers would not make her biased and she maintained she could render a fair and impartial verdict.

Mrs. Glass did state that she would wonder why a defendant did not take the stand, but when examined further, she clearly was rehabilitated. She declared she understood that the State must prove that a person did it and that a person does not have to prove that he did not do it. Although the judge's instruction that she could not assume he was guilty simply because he did not choose to testify "when he has a right to so do" may have been a confusing statement on the right to remain silent, it is clear Mrs. Glass accepted the instruction of a presumption of innocence and a defendant's right to remain silent without inferring any guilt.

The Louisiana Supreme Court has recognized that service on a criminal jury by one associated with law enforcement duties must be closely scrutinized but such association does not automatically disqualify a prospective juror. Herein, while Mrs. Glass' statements appear to have provided sufficient grounds for a challenge for cause, it would also appear the later responses indicate her willingness and ability to decide the case impartially and according to the law and evidence. State v. Sonnier, 379 So.2d 1336 (La. 1980); State v. Nolan, 341 So.2d 885 (La. 1977); and State v. Calloway, 343 So.2d 694 (La. 1976).

The trial judge is vested with broad discretion in ruling on a challenge for cause and that ruling will not be

disturbed on appeal absent a showing of abuse of discretion. State v. Sonnier, supra, State v. Monroe, 366 So.2d 1345 (La. 1978); State v. Passman, 345 So.2d 874 (La. 1977). Moreover, a judge's refusal to excuse a prospective juror for cause is not an abuse of discretion, notwithstanding that the juror voiced a seemingly prejudicial opinion, whereupon further inquiry he has demonstrated a willingness and ability to decide the case impartially according to the law and evidence. State v. Passman, supra. A full review here shows the juror was rehabilitated and her opinion would give way to the instructions of the court.

Accordingly, it is submitted there is no merit to this allegation of error to justify granting a writ.

ASSIGNMENT NO. 4

Petitioner submits that Baldwin was illegally arrested because the officers lacked probable cause and the subsequent consents to search were tainted as an exploitation of the original illegal arrest.

This argument ignores the fact that a warrant for Baldwin's arrest had issued on April 8, 1978 that was based on a detailed affidavit executed by two of the investigating police officers and thereafter the Arkansas officers arrested Baldwin with knowledge of the outstanding warrant.

Consequently, this is not a situation in which it must be determined if the arresting officers had probable cause to execute the arrest since that is a question to be considered only on a warrantless arrest. As observed by the Louisiana Supreme Court, "There is no question that Baldwin was legally arrested pursuant to a valid warrant."

Petitioner admits that the evidence seized was obtained pursuant to written consents given by the defendant and the invalidity thereof is only maintained on the basis of being tainted by an illegal arrest.

As shown hereinabove defendant's arrest was based on a valid warrant so this argument of an invalid consent must fall.

Alternatively, if there was some taint in the arrest by confusion in the description of Baldwin's vehicle which lead to his location of the time of the execution of his arrest, the subsequent consents to search were sufficiently attenuated to be clearly valid under the test recognized in Brown v. Illinois, 422 U.S. 590 (1975). Clearly the consent was the product of free will and not an exploitation of an illegal arrest. The record shows in Arkansas defendant was informed of his Miranda rights, he was read the permission to search form and voluntarily and intelligently signed it. Again in Monroe, Louisiana, he was read a permission to search form and freely signed the consent to search.

It must be concluded this evidence was properly introduced in the trial of the case.

CONCLUSION

It is urged for the foregoing reasons the application for writs be denied.

Respectfully submitted,

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